

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

**TORRES CONSULTING AND LAW
GROUP, LLC,**
2239 W. Baseline Road,
Tempe, AZ 85283

Plaintiff,

v.

**DEPARTMENT OF VETERANS
AFFAIRS,**
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Defendant.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Torres Consulting and Law Group, LLC ("TCLG"), by and through undersigned counsel, files this action for declaratory and injunctive relieve and seeks the disclosure of public agency records improperly withheld by the Department of Veterans Affairs ("the Department") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended.

2. To remedy these violations of law, TCLG seeks an order declaring that the Department has failed to comply with FOIA by withholding the requested documents, and injunctive relief ordering the Department to produce all responsive documents immediately. TCLG alleges the following:

PARTIES

3. Plaintiff, TCLG, is a limited liability company, incorporated in the State of Arizona, with its principle place of business in Tempe, Arizona. TCLG is a consulting firm that oversees compliance on construction projects throughout the United States.

4. The Department is an agency of the federal government of the United States.

JURISDICTION AND VENUE

5. This court has subject matter jurisdiction over this action and personal jurisdiction over the Department pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(c) and 5 U.S.C. § 552(a)(4)(B). TCLG's principal place of business is in Tempe, which is in the District of Arizona.

STANDARD OF REVIEW

7. Pursuant to 5 U.S.C. § 552(a)(4)(B), this Court reviews the Department's denial of TCLG's FOIA request de novo.

STATUTORY BACKGROUND

The Freedom of Information Act

8. FOIA provides that federal agencies are required to disclose requested information to the general public unless the requested information falls under one of the nine narrowly construed disclosure exemptions.

9. Upon receipt of a FOIA request, the agency has twenty business days to make a determination regarding the processing of the request. 5 U.S.C. § 552(a)(6)(A)(i). The agency is required to notify the requester of the agency's determination and the "reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination." *Id.*

10. A determination by the agency to comply with the FOIA request requires that the agency make records "promptly available" to the requester. 5 U.S.C. § 552(a)(6)(C)(i).

11. To allow for a final determination, a federal agency may take a statutorily permitted ten day extension when "unusual circumstances" are present and identified. 5 U.S.C. § 552(a)(6)(B)(i).

12. When an administrative appeal is filed following an adverse determination, the federal agency has twenty business days from the receipt of a properly filed FOIA appeal to make a determination. 5 U.S.C. § 552(a)(6)(A)(ii).

1 trainee program for Bergelectric; and

2 c. Copies of Davis-Bacon compliance interviews conducted by the
3 contracting agency for Bergelectric.

4 21. On July 2, 2012, the Department acknowledged receipt of TCLG's request
5 and noted that the "request will be processed on a simple track due to the limited amount
6 of work/time needed to process your request and the number of pages involved." The
7 Department assigned the request FOIA tracking number 12-06361-F. A copy of the
8 letter is attached to this Complaint as Exhibit B.

9 22. By letter to the Department's FOIA Officer, Lynn Buell, TCLG submitted
10 a second FOIA request concerning the Project on August 10, 2012. A copy of the
11 second FOIA request is attached as Exhibit C.

12 23. TCLG requested the following documents that upon information and belief
13 the Department has obtained pertaining to the Project:

- 14 a. Certified Payrolls for the most current three (3) weeks from the following
15 subcontractors: C&B Plumbing and Heating, GCH Construction Company,
16 JE Hurley Construction, Inc., Apollo Sheet Metal and Burgess Services;
- 17 b. Fringe Benefit Statement including, if applicable, apprentices;
- 18 c. Copy of all conformances (Additional Classification and Rate) requested
19 and/or submitted for this project;
- 20 d. Copy of all conformance request (Additional Classification and Rate)
21 responses, approvals, denials, and/or modifications issued by the
22 Department of Labor (DOL) for this project;
- 23 e. The name of the bona fide apprenticeship program and evidence of the
24 formal certification by the DOL for a trainee program in which a trainee(s),
25 on the job may be registered; and
- 26 f. Copies of Davis-Bacon compliance interviews conducted by the
27 contracting agency.

28 24. On September 24, 2012, the Department acknowledged receipt of TCLG's
second request and noted that the "request will be processed on a simple track due to the

1 limited amount of work/time needed to process your request and the number of pages
2 involved.” The Department assigned the request FOIA tracking number 12-08041-F. A
3 copy of the letter is attached to this Complaint as Exhibit D.

4 25. TCLG requires timely processing of these FOIA requests because if the
5 construction of these projects is completed prior to the release of the information, the
6 remedies and enforcement options available to address non-compliant acts and actors are
7 unavailable.

8 26. On January 03, 2013, TCLG sent a letter to the Department’s FOIA
9 Officer, Ms. Lynn Buell, noting the unreasonable delay in processing TCLG’s FOIA
10 requests and demanding that “your office use due diligence and process the requests in a
11 reasonable time manner.” An unsigned file copy of the letter attached as Exhibit E.

12 27. The Department’s Assistant General Counsel Deborah K. McCallum
13 responded to TCLG’s final demand letter on February 6, 2013 (“McCallum Letter”). A
14 copy of the letter is attached to this Complaint as Exhibit F (“McCallum Letter”).

15 28. The Department treated TCLG’s final demand letter as “an appeal for
16 expedited processing.” (McCallum Letter at 1.)

17 29. At the time the McCallum Letter was written, FOIA request 12-06361-F
18 had been pending before the Department for 188 days; FOIA request 12-08041-F had
19 been pending before the Department for 180 days.

20 30. Although it acknowledged that TCLG asserted a processing time in excess
21 of six months was unreasonable, the Department implicitly maintained in its letter that
22 receiving a response earlier than six months from the date of request required it to be
23 “processed expeditiously and out of sequence.” (McCallum Letter at 2.)

24 31. The Department denied TCLG’s appeal for expedited consideration. (*Id.*)

25 32. The Department acknowledged that the “letter concludes the administrative
26 processing of [TCLG’s] appeal referred to above and constitutes the final decision of the
27 Department of Veterans Affairs regarding [TCLG’s] appeal.” (McCullum Letter at 3.)

28 33. At the time of this filing, Defendant has not processed TCLG’s requests for
over 200 days.

CAUSES OF ACTION

34. TCLG incorporates all allegations in the above paragraphs into this section by reference.

35. Upon information and belief, Defendant is in possession of the documents stated in the above section that are public records subject to disclosure under FOIA.

36. Defendant continues to withhold these documents from TCLG in violation of FOIA.

37. Defendant has violated FOIA's requirement to respond to public records requests within 20 days, or 30 days under extraordinary circumstances. 5 U.S.C. § 552(a)(6)(A).

38. Alternatively, Defendant's delay of over 200 days demonstrates that the agency is not exercising due diligence in responding to TCLG's request, contrary to FOIA requirements. 5 U.S.C. § 552(a)(6)(C).

39. In the McCullum Letter, the Department acknowledged a pattern of taking in excess of six months to process simple FOIA requests in violation of FOIA. 5 U.S.C. § 552(a)(6)(A).

40. The legal standard of de novo review is applicable and the defendant must carry the burden of proof in justifying the determination to withhold requested information pursuant to 5 U.S.C. § 552(a)(4)(B).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Declare that Defendant's failure to provide TCLG with all of the information requested in its FOIA requests violated FOIA as set forth above;
- B. Enjoin the Department from withholding the identified documents from TCLG;
- C. Order the Department to immediately provide TCLG with copies of all of the documents requested in the two cited FOIA requests;
- D. Grant TCLG such other injunctive and declaratory relief as this Court deems just and proper;

1 E. Retain jurisdiction over this case to ensure compliance with this Court's
2 decree; and

3 F. Award TCLG its reasonable attorney fees, costs and expenses incurred in
4 pursuing this action.

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9 Respectfully submitted,

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11 Dated this 1st day of March, 2013.

12 /s/ James E. Barton II
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